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NORSIAH ALI v. RASYIKIN HUSAIN; MAJLIS PEGUAM MALAYSIA (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[ORIGINATING SUMMONS NO: WA-17D-2-01-2018]
B 3 OCTOBER 2018

LEGAL PROFESSION: *Disciplinary proceedings – Disciplinary Board – Solicitor ordered to make restitution of amount owed to complainant and be struck off Roll – Whether sentence proportionate with misconduct – Solicitor entered into consent* C *judgment with complainant – Whether solicitor remedied wrong committed – Whether complainant paid in full – Whether solicitor remorseful – Whether sentence varied – Legal Profession Act 1976, ss. 103(1), 103D(2), 103D(4), 103D(5) & 103E(4)*

D The applicant, who was retained to handle a purchase of a property, failed to execute the sale transaction after a lapse of five years. The purchaser had paid the full purchase price of RM58,800 to the applicant, out of which, RM4,800 was paid to the vendor, and the remaining RM54,000 was to be used to redeem the property from AmBank (M) Bhd ('AmBank'). Consequently, a letter of complaint was sent to the Advocates and Solicitors E Disciplinary Board ('DB'). Based on the recommendation by the Disciplinary Committee, the DB ordered that the applicant make restitution to the complainant in the sum of RM58,800 pursuant to sub-ss. 103(1), 103D(2), 103D(4) and 103D(5) of the Legal Profession Act 1976 ('LPA'). It was further ordered that the applicant be struck off the Roll of the F Advocates and Solicitors. In the meantime, the purchaser of the property filed a civil suit against the applicant's firm. Subsequently, both parties entered into a consent judgment following which the applicant had paid RM50,300 to the purchaser's new solicitors, the balance of the purchase price paid to the applicant after the earlier payment of RM4,800 made to the G vendor and RM3,700 to AmBank. The applicant also made the payment of: (i) RM2,000 to AmBank for the outstanding sum of the loan; (ii) RM8,032.90 to the purchaser's new solicitors to make full payment for the redemption of the property; and (iii) RM5,000 as costs to the purchaser in the civil suit. Hence, in this application, the applicant sought to set aside the decision of the DB pursuant to s. 103E(4) of the LPA. The issue herein H was whether the sentence was proportionate with the misconduct committed by the applicant and on the facts of the case.

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Held (allowing application):

(1) The applicant's misconduct was in regard to her failure to pay the balance sum to the assignee bank and there was no criminal element attributed to the applicant. The applicant had admitted that she had committed professional misconduct and entered into a consent judgment with the purchaser with regard to a civil suit filed by the purchaser. The applicant also had repaid more than the full amount of the purchase price and had remedied the wrong committed and was remorseful. In the circumstances, the sentence meted out by the DB was manifestly harsh. Therefore, the applicant's application was allowed and the DB's decision in striking off the applicant's name from the Roll of the Advocates and Solicitors and ordering restitution to the complainant in the sum of RM58,900 was set aside. The sentence by the DB was substituted with a sentence of suspension for a period of four years with effect from 15 December 2017. (paras 14-18)

Case(s) referred to:

Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener) [2018] 2 CLJ 1 FC ***(refd)***

Iszam Kamal Ismail v. Prestij Bestari Sdn Bhd; Majlis Peguam Malaysia (Intervener) [2017] 10 CLJ 417 CA ***(refd)***

Majlis Peguam Malaysia v. Hari Krishnan Jeyapalan [2017] 4 CLJ 225 CA ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 94(2), 103(1), 103D(2), (4), (5), 103E(4)

For the applicant - Razlan Hadri & Danny Soong; M/s Gan, Ho & Razlan Hadri
For the respondent - In person
For the intervener - GK Ganesan & KN Geetha; M/s GK Ganesan

Reported by S Barathi

JUDGMENT

Nordin Hassan J:

Introduction

[1] The applicant in this case filed an originating summons to set aside the decision of the Disciplinary Board dated 15 December 2017 pursuant to sub-s. 103E(4) of the Legal Profession Act 1976.

[2] The Disciplinary Board had ordered that the applicant makes restitution to the complainant in the sum of RM58,800 pursuant to sub-ss. 103(1), 103D(2), 103D(4) and sub-s. 103D(5) of the Act. It was further ordered that the applicant be struck off the Roll of Advocates & Solicitors of the High Court of Malaya with effect 21 days from the date of the order.

A **The Brief Facts**

[3] The relevant facts based on the affidavits and documents filed in this application as well as submissions made by both parties are the following:

(i) The applicant was retained by one Zainab binti Hamzah to handle the
B purchase of a property from Mohamad bin Ismail at the purchase price of RM58,000. The said property is a house known as No. K-1-042 B, Jalan LP 7/4, Lestari Perdana, Bandar Putra Permai, 43000 Seri Kembangan ('the property') and at the material time, the property was assigned to AmBank (M) Bhd.

C (ii) On 12 April 2011, a sale and purchase agreement in relation to the property was signed by both parties. The full purchase price in the sum of RM58,800 has been paid by the purchaser to the applicant. However, no receipt of payment was issued by the applicant. Out of this purchase sum, RM4,800 was paid to the vendor. The remaining
D RM54,000 was to be used to redeem the property from AmBank (M) Bhd.

(iii) However, the applicant had failed to redeem the property and the reasons given by the applicant are that there were outstanding administrative and maintenance fees owed by the vendor to the
E developer and the balance amount of RM54,000 in the applicant's client's account was insufficient to redeem the property.

(iv) As the applicant failed to execute the sale transaction after a lapse of five years, on 9 August 2016, a letter of complaint was sent to the Advocates & Solicitors Disciplinary Board against the applicant. The
F complaints against the applicant as summarised by the Disciplinary Committee in its report are as follows:

(a) The respondent did not pay the balance sum of RM58,800 of the sale and purchase of the property to the vendor in spite of the full sum being paid to the respondent.

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(b) No receipts whatsoever were issued.

(c) The respondent was slow and uncooperative and gave various reasons for the delay.

H (v) Having heard the evidence by relevant parties, the Disciplinary Committee finds that the applicant has committed professional misconduct against the complainant which *inter alia* include the following:

(a) The balance sum of the sale and purchase price of RM54,000
I has not been utilised to pay the redemption sum outstanding and is also not in the respondent's client's account contrary to the claim made by the respondent.

(b) Not paying the balance sum to the assignee bank although the redemption statement was obtained twice; in 9 April 2012 (R6) and 2 March 2015 (R7). A

(c) Receipts were not given immediately to the complainant bolstering the complainant's claim, notwithstanding respondent's claim of the receipts being kept by the accounts department. B

The respondent furnished the said receipts (R11 & R12) after a lapse of a week from the dateline given to furnish them to the Committee.

(d) The complainant provides no record of excuses given by respondent except both agreed that they met in December 2016. In fact, there were no correspondences between the parties. C

(vi) In the circumstances, the Disciplinary Committee, pursuant to sub-s. 103(1) of the Act made the following recommendation to the Disciplinary Board: D

(a) There is therefore cause for disciplinary action to be taken against the solicitor, Cik Norsiah binti Ali of M/s Zamri Anuar & Norsiah and the firm as there is not only procedural delay in handling the matter but breach of trust as well.

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(b) The breach of trust is extremely serious and the Committee recommends that the respondent be suspended for a period and the firm be held accountable too.

(c) Respondent must make restitution of the sum of money paid to her firm. F

(d) Respondent must ensure that the property is properly transferred to the purchaser without delay.

(e) Respondent must be liable for all claims made by vendor.

(vii) Thereafter, on 15 December 2017 the Disciplinary Board made its decision as mentioned earlier and the grounds of its decision was informed to the applicant by letter dated 26 February 2018 as reproduced below: G

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LEMBAGA TATATERTIB PEGUAM - PEGUAM

ADVOCATES & SOLICITORS DISCIPLINARY BOARD

8th & 9th Floor, Wisma Maran, 28 Medan Pasar, 50050 Kuala Lumpur

B

Phone: (603) 2034 1911
Fax: (603) 2031 2163
e-mail: secretariat@asdb.org.my

Working Hours
Monday – Friday
8.30 a.m. – 5.30 p.m.

Your Ref :

Our Ref : DC/16/0634/nan*(ground)*

Date : 2 8 FEB 2018

C

Cik Norsiah Binti Ali
No. 4, Jalan 2/4
Bandar Baru Selayang
68100 Batu Caves
Selangor

(The Respondent)
By Post

5/3/18

Dear Madam,

D

Re: Complaint No : DC/16/0634
Complainant : Rasyikin Binti Husain
Respondent : Norsiah Binti Ali

Kuala Lumpur High Court Originating Summons No. WA -17D-2-01/2018
Appellant : Norsiah Binti Ali
Respondent : Rasyikin Binti Husain

HAJJARAL ASWANI, IZWA JURISH & CO
Peguambela & Peguamcara
13-1A Plaza UMNO
Jalan Batu Caves
68100 Batu Caves, Selangor.
Tel / Fax : 03-61811062

We refer to your letter dated 03.1.2018, contents of which have been duly noted.

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As requested, set out below are the grounds of the Board's decision for your perusal:-

Decision: The Board made reference to the Report submitted by the Disciplinary Committee and noted the following:

i) that the balance purchase price of RM54,000.00 has not been utilized to pay the redemption sum outstanding and is also not in the Respondent's Client' Account contrary to the claim made by the Respondent;

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ii) that the Respondent has failed to pay the balance sum to the Assignee Bank although the Redemption Statement were obtained twice i.e on 09.4.2012 and 02.3.2015;

iii) that the Respondent's failure in providing receipts immediately to the Complainant has bolstered the Complainant's claim, notwithstanding Respondent claims of the receipts being kept by the Accounts Department.

The Board was therefore in agreement with the Disciplinary Committee's finding that that Respondent had committed breach of trust but partly disagreed with its recommendation on punishment.

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The Board was also of the view that a serious misconduct has been committed by the Respondent and ordered the Respondent be Struck off Roll of an Advocate and Solicitor of the High Court of Malaya and to make restitution in the Sum of RM58,800.00 to the Complainant.

Thank you.

Yours faithfully,

WITHOUT PREJUDICE

H

Cheryl Nicholson
Director
Complaints Secretariat

C. C. Messrs Hajjaral Aswani, Izwa Jurish & Co
Advocates & Solicitors
13-1A Plaza UMNO
Jalan Batu Caves
68100 Batu Caves, Selangor
(Your Ref:Haji/lit-norsiah/2026/bc)

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RECEIVED
05 MAR 2018
M. S. VETHAMUTHU & ASSOCIATES
ADVOCATES & SOLICITORS

(Counsel for the Complainant)
By Fax:03-61811062/Post

(viii) The purchaser of the property had also filed a civil suit at Shah Alam Sessions Court against the applicant's firm in March 2017 but on 12 April 2017 both parties entered a consent judgment on the following terms:

(a) A declaration that the applicant and the applicant's firm was professionally negligent in their failure to complete the sale and purchase of the property;

(b) That the applicant is to pay any late payment penalty to the vendor;

(c) That the applicant will have to pay exemplary damages (to be assessed by the court) for the negligence; and

(d) That the applicant will pay the purchaser RM5,000 as costs for the civil action.

(ix) In relation to the consent judgment, on 1 August 2017, the applicant had paid RM50,300 to the purchaser's new solicitor, Messrs Saleh & Aizac. This amount is the balance of the purchase price paid to the applicant after the earlier payment made to the vendor in the sum of RM4,800 and RM3,700 to AmBank (M) Bhd.

(x) On top of the total amount of RM58,800 paid by the applicant, the applicant also made the following payments:

(a) RM2,000 to AmBank (M) Bhd for the outstanding sum of the loan.

(b) RM8,032.90 to the purchaser's new solicitor to make full payment for the redemption of the property.

(c) RM5,000 as costs to the purchaser in the civil suit filed at Shah Alam Sessions Court.

The Applicant's Submission

[4] Counsel of the applicant in his oral submission before this court conceded that the applicant has committed professional misconduct but contends that the sentence to struck off the Roll of Advocates and Solicitors by the Disciplinary Board is excessive, harsh and disproportionate.

[5] It was further argued that there is no criminal element in the applicant's case but misconduct for failing to pay the balance sum to the assignee bank. The applicant also had remedied the wrong committed by paying more than the full amount of the purchase price of the property.

A **The Submissions By The Bar Council (The Intervener)**

[6] Counsel acting for the intervener on the other hand, *inter alia*, submits that the misconduct committed by the applicant is serious and it involved a breach of trust. As such, the sentence by the Disciplinary Board is appropriate and should not be disturbed by this court.

B **Decision Of This Court**

[7] At the outset, the sentence imposed by the Disciplinary Board against the applicant is within the power given under sub-s. 94(2) of the LPA 1976 which provides:

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> (2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishment:
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> (a) to be struck off the Roll;
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> (b) to be suspended from practice for any period not exceeding five years;
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> (c) to be ordered to pay a fine out exceeding fifty thousand ringgit; or
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> (d) to be reprimanded or censured.

[8] The only issue here is whether the sentence is proportionate with the misconduct committed by the applicant and on the facts of this case.

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[9] The matters to be considered by the Disciplinary Board before imposing sentence has been explained by the Court of Appeal in the case of *Majlis Peguam Malaysia v. Hari Krishnan Jeyapalan* [2017] 4 CLJ 225 in the following words:

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> We would take the approach that looking at the offence for the purposes of sentencing the respondent, right thinking members of the Disciplinary Board should consider and deliberate on the mitigatory factors presented before it metes out the appropriate punishment. In a situation where punishment ranges from reprimand and/or ensure to striking out from the Roll, it would be expected of right thinking members of the DB to consider:
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> (a) the gravity of the offence;
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> (b) the exculpatory conduct of the respondent;
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> (c) the conduct of the complainant since lodging the complaint.
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> before deciding the appropriate punishment meted out ...

[10] The facts in *Hari Krishnan*'s case has some similarity with the present case where the current balance in the client's account did not reflect the sum of money that the applicant holds on behalf of the purchaser. It was held by the Court of Appeal that the sentence to struck the respondent off the Roll of Advocates and Solicitors is manifestly harsh and substituted the sentence with a fine of RM11,400.

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[11] On this issue of proportionality, it is also instructive to refer to the Court of Appeal case, *Iszam Kamal Ismail v. Prestij Bestari Sdn Bhd; Majlis Peguam Malaysia (Intervener)* [2017] 10 CLJ 417 where it states:

> [8] The powers of sentencing empowered to DB is set out in s. 94 of the Legal Profession Act 1976 (LPA 1976). That section itself makes it clear that the DB has various options related to sentencing. It all depends on the nature and gravity of the misconduct. The Legislature, in the wisdom, directly or indirectly, incorporated the proportionality principle of sentencing by stating that an advocate and solicitor found guilty of any misconduct can be struck out from the Roll or suspended or ordered to pay a fine or be reprimanded or censored as the case may be. *To put it crudely, the option to 'struck out' from the Roll must be based on grave misconduct which necessarily must relate to dishonesty or conduct for which other form of sentencing may not be appropriate.*

[12] In this case also the Disciplinary Board's decision to struck the respondent off the Roll of Advocates and Solicitors was set aside and substituted with a suspension for three years and a fine of RM10,000. The complaint against the appellant in this case amongst others is that the appellant had issued out the sum of RM318,000 from the client's account which was in stakeholding to a third party without authorisation from the client.

[13] Next, in a Federal Court case, *Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener)* [2018] 2 CLJ 1; [2018] 2 MLJ 265, the first and second appellants, who were partners in the firm Messrs Khana & Co were found by the Disciplinary Board to commit professional misconduct and were struck off the Roll of Advocates and Solicitors. The complaint against them *inter alia* is for misappropriation of a portion of trust money in the sum of RM7 million belonging to several 'orang asli' in Johor.

The sentence imposed by the Disciplinary Board was upheld by the High Court and the Court of Appeal. However, the Federal Court allowed the appeal by the first appellant and substituted the sentence with a suspension for a period of five years.

[14] Guided by the authorities above-mentioned, in the present case, I find the Disciplinary Board has failed to consider the following matters:

(i) the applicant's misconduct was in regard to her failure to pay the balance sum to the assignee bank and there is no criminal element attributed to the applicant. As mentioned in *Iszam*'s case at p. 429:

> [13] A survey of some of the cases before and after the coming into effect of the LPA 1976 will demonstrate that the courts had often allowed an advocate and solicitor to be struck out from the Roll only when there was criminal element personally attributed to the advocate and solicitor. Support for the proposition is found in a number of cases.

(ii) the applicant has repaid more than the full amount of the purchase price.

(iii) the applicant admitted that she has committed professional misconduct and entered into a consent judgment with the purchaser with regard to a civil suit filed by the purchaser.

(iv) the applicant is remorseful and had remedied the wrong committed.

[15] The conduct of the applicant for not paying the balance sum to the assignee bank is poles apart from the conduct of the first appellant in *Dinesh Kanavaji*'s case where he misappropriated a sum of RM7 million belonging to several 'orang asli' and yet the sentence to struck off the Roll of Advocates and Solicitors was replaced by the Federal Court with a suspension of five years.

[16] Therefore, I find the sentence meted out by the Disciplinary Board in the present case manifestly harsh.

Conclusion

[17] Based on the aforesaid reasons, the applicant's application is allowed and the Disciplinary Board's decision in striking the applicant off the Roll of Advocates and Solicitors and in ordering restitution to the complainant in the sum of RM58,900 is set aside.

[18] The sentence by the Disciplinary Board is hereby substituted with a sentence of suspension for a period of four years with effect from 15 December 2017.